Supreme Court, U.S.
FILED
DEC 3 1 2008
OFFICE OF THE CLERK

114

No. 08-626

IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

I. The Eighth Circuit's Decision Seriously Misreads Section 253. 2

II. There Is No Merit To The City's Claim That Its Ordinance Has "No Effect" On Petitioner 6

III. The Eighth Circuit Correctly Recognized That Its Ruling Gives Rise To Two Conflicts In The Circuits. 9

CONCLUSION 12

APPENDIX

Brief of *Amicus Curiae* Level 3 Communications, LLC, in No. 08-759, *Sprint Telephony, PCS, v. San Diego County, Calif.* 1a

TABLE OF AUTHORITIES

Cases

Nixon v. Mo. Mun. League, 541 U.S. 125 (2004) 2, 4

Puerto Rico Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006) 11

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 11

Sprint Telephony PCS, L.P. v. County of San Deigo, 542 F.3d 571 (9th Cir. 2008) 10

TCG NY, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 11, 12

Verizon Commc'ns., Inc. v. FCC, 535 U.S. 467 (2002) 2

Statutes

47 U.S.C. § 253(a) ..... *passim*

47 U.S.C. § 253(c) ..... *passim*

Other

Level 3 Communications, Annual Report (Form 10-K) (Feb. 29, 2008) 8

REPLY BRIEF FOR THE PETITIONER

The Telecommunications Act of 1996 provides that no state or local regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" (47 U.S.C. § 253(a)), reserving the authority "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" (*id.* § 253(c)).

Respondent City of St. Louis argues that this Court's review of the Eighth Circuit's construction of Section 253 is unwarranted because the record supposedly shows, and the Eighth Circuit supposedly held, that the City's ordinance had no adverse effect on petitioner; therefore, respondent asserts, its ordinance would not be preempted under any of the circuits' competing interpretations of Section 253. Respondent's argument rests on a substantial misstatement of both the record and the Eighth Circuit's decision. The exorbitant fees that St. Louis charges petitioner and other providers for access to that market inhibits competition by deterring entry and by trading off against the funds available to develop new services. But because money is fungible, those fees do not necessary limit particular service offerings in the city. The court of appeals accordingly sustained the ordinance not on the false premise that it had no effect on petitioner, but rather because the court avowedly read Section 253 narrowly to require petitioner to make a very particular showing: that Level 3 was unable to provide particular services in St. Louis as a result of the ordinance.

The Eighth Circuit had no justification for departing from this Court's correct understanding that Section 253 preempts any measure that "impedes the provision of telecommunications services" (*Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 491 (2002)) or "interfere[s] with the delivery of telecommunications services" (*Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004)). Like other circuits, which properly reject the Eighth Circuit's stringent standard of proof, the court of appeals should have held that an unreasonably large licensing fee like St. Louis's necessarily inhibits competition and triggers preemption under Section 253. Certiorari is warranted to correct that error and the circuit conflicts it spawned.[1]

I. THE EIGHTH CIRCUIT'S DECISION SERIOUSLY MISREADS SECTION 253.

As the petition demonstrated, the Eighth Circuit's decision suffers from at least two significant flaws.

First, the ruling below erroneously places determinative weight on the ordinance's effect on the services provided within that locality by the

---

[1] This case also presents the best vehicle for resolving the twin circuit conflicts over the meaning of Sections 253(a) and (c). The telecommunications provider in No. 08-759, *Sprint Telephony PCS, L.P. v. San Diego, Cal.*, has requested that the Court not grant certiorari in this case and hear argument this Term, so that the *Sprint* petition can be consolidated with this one. For the reasons set forth in petitioner's *amicus* brief in No. 08-759 (which is reproduced as an Appendix to this reply, *infra*), that suggestion is not well founded.

particular telecommunications provider that happened to bring suit. Section 253(a) measures preemption by the burden of a municipal ordinance on "the ability of *any* entity to provide *any* interstate or intrastate telecommunications service," with no geographic restriction (emphases added). By definition, an "interstate" service is not offered in one particular locale. Congress recognized that public rights-of-way are not only an essential component of service to local markets but also constitute a significant bottleneck to *nationwide* communications across backbone networks traversing innumerable municipalities. The statute thus looks broadly to whether the local ordinance is of a type that inhibits the delivery of telecommunications services generally.

The court of appeals' holding that the City's ordinance is not preempted because petitioner elected to provide services in St. Louis misreads Section 253. The fact that petitioner – an international telecommunications provider which had already entered the market – did not limit its services or withdraw from the market is not determinative of the preemption inquiry. Indeed, Congress could not have intended the validity of the ordinance to turn on the coincidence of whether the plaintiff telecommunications provider happens to be small enough or so financially fragile that the municipality's fee renders it peculiarly unable to serve that market.

The court of appeals' holding is further flawed because it affords no weight to the fact that the ordinance significantly inhibits competition not only by deterring entry by other, smaller would-be

entrants, but also by diverting to the City funds that petitioner and other providers would otherwise use to develop and deploy additional services around the country. It furthermore fails to apply the proper "broader frame of reference" that "ask[s] how Congress could have envisioned the preemption clause [of Section 253] actually working" (*Nixon*, 541 U.S. at 133) if municipalities nationwide adopted the authority claimed by St. Louis and awarded by the Eighth Circuit to impose burdensome licensing requirements and exact exorbitant fees. Accepting that logical consequence of the court of appeals' ruling, the many billions of dollars in fees that would be charged to petitioner and other competitive providers would have a crushing effect on the delivery of telecommunications services.

Second, Congress specified the measure for determining whether fees sufficiently inhibit competition to trigger preemption in Section 253(c), which gives local governments limited authority to adopt fees that exact "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis." Congress' determination in Section 253(c) to constrain the range of permissible right-of-way fees to those that are "fair and reasonable" necessarily rests on its conclusion that, left to their own devices, local governments would impose barriers to entry (including monopolistic fees) and thereby inhibit entry by competing telecommunications providers. *See* Pet. 16-17 n.1; *cf.* BIO 15 (embracing the view that "Section 253(a), as adopted, was primarily concerned with uprooting regulatory systems that granted telephone monopolies").

Indeed, respondent seemingly recognizes that its position rests on the claim that the only constraint on its power to set right-of-way fees is that imposed by "free markets" (BIO 24), such that it has the same power to set rents as any other landlord (*id.* at 24 n.16). On that reading, Section 253 allows the City to charge whatever fee reflects "the valuable right to place [a provider's] fiber optic cable and related facilities in the City's rights-of-way" (*id.* at 7) in light of the high "value of the real estate in St. Louis" (*id.* at 21 n.14). But public rights-of-way are dramatically different from the open market for housing: municipalities, by definition, hold a monopoly over the rights-of-way that must be traversed to construct a telecommunications network. Consequently, respondent's position is that it can charge monopoly rents without regard to their adverse effect on competition, as St. Louis has done with the bottleneck facility over which it has exclusive control. But that is precisely what Section 253 forbids.

By embracing the City's position, the Eighth Circuit's decision all but reads Section 253(c) out of the statute. The structure of the Act – in which Section 253(c) is an exception to the prohibition of Section 253(a) – necessarily implies that Congress intended the latter to have a broader preemptive sweep. But on the court of appeals' narrow reading of Section 253(a), it is hard to imagine a fee that is simultaneously so large that it precludes particular local services in violation of Section 253(a) but so small that it is saved as "fair and reasonable compensation" under Section 253(c). Put another way, the Eighth Circuit's decision implausibly

authorizes municipalities to enact *un*fair and *un*reasonable fees, so long as those fees cannot be traced to the plaintiff's decision to withdraw specific services from that jurisdiction.

The Eighth Circuit's ruling equally reads Section 253(c) out of the statute by affording no weight to the fact that, by imposing a substantially less onerous and expensive legal regime on the incumbent telecommunications provider, the ordinance impermissibly "discriminat[es]" (Section 253(c)) against new entrants to the St. Louis market. *See* Pet. 4, 9, 15, 20. Similarly, in several respects – such as the limitation on the types of services Level 3 may provide – the ordinance regulates telecommunications directly, not merely "the public rights-of-way." *See id.* at 22-23.

II. THERE IS NO MERIT TO THE CITY'S CLAIM THAT ITS ORDINANCE HAS "NO EFFECT" ON PETITIONER.

Certiorari is also warranted because this case presents an ideal vehicle in which to address the proper construction of Section 253. The record demonstrates that:

- petitioner pays roughly $140,000 in annual licensing fees just for access to public rights-of-way in St. Louis, nearly double Level 3's total annual revenue from all of its local customers in the City (Pet. 7 (citing C.A. J.A. 425-47))[2];

---

[2] That figure does not, as the City assumes without explanation, "exclude[] revenues where a call or service may originate in St. Louis and terminate elsewhere, or vice versa."

- if other local jurisdictions adopted the same fee structure, petitioner would be forced to pay well over a *billion* dollars in additional costs (*see id.* at 19); and
- the fees that petitioner pays the City would otherwise be used to develop additional services, which petitioner would use to compete against other providers (*see id.* at 16 (citing C.A. J.A. 423, 433)).

Furthermore, given that respondent does not contend that its fees bear "*any* relation" to its costs (Pet. App. 54a (emphasis added)), there is no serious argument that those fees represent permissible "compensation" for any service provided by the City. Nor are the fees "fair and reasonable." Respondent's assertion that its fees are "less than what Level 3 pays in other jurisdictions" (BIO 32) is substantially misleading: while a small minority of jurisdictions impose similarly massive fees (which petitioner believes are preempted as well), there are also a substantial number of jurisdictions that charge less – or nothing – for use of the public rights-of-way. *See, e.g.*, R.S. Mo. § 67.1840.2(1) (fees limited to "actual, substantiated costs); Cincinnati Mun. Code ch. 405 (no fee). St. Louis's fee of approximately $2.00 per foot is more than *ten times* the average fee that Level 3 pays for access to rights-of-way on its network. *See*

Contra BIO 8. The multi-million dollar figure of petitioner's "revenues attributed to the St. Louis market" cited by the City (BIO 7) is grossly inflated because it represents an estimate of the total revenue from a portion of *all* telecommunications that traverse the St. Louis segment of petitioner's network while traveling across the country. *See* C.A. J.A. 425-26, 768-69.

Level 3 Communications, Annual Report (Form 10-K), at F-88 (Feb. 29, 2008).

The City's contention that this case nonetheless is a poor vehicle to resolve the correct interpretation of Section 253 because petitioner failed to prove that the ordinance has any material adverse effect on it misstates both the record in this case and the legal conclusion that the Eighth Circuit drew from it. The court of appeals held that Section 253 preempts only local regulations that cause petitioner not to provide specific services in that local market. Pet. App. 11a, 13a. Petitioner candidly acknowledged that "it cannot be determined what services Level 3 might have provided or developed using the money that was otherwise paid to St. Louis." BIO 8 (quoting C.A. J.A. 384). On that basis, the court of appeals found dispositive that petitioner "cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." Pet. App. 32a.

Contrary to the City's supported assertions, however, petitioner manifestly did *not* concede more broadly "that the ordinance had no impact" (BIO 22 n.15) and, in turn, the Eighth Circuit did not rest its decision on a non-existent "admission that the company could not identify any impact" (*id.* at 22-23). Rather, the record shows (and the court of appeals did not doubt) that the City's burdensome regime adversely affects competition (*see supra* at 6-7), but not in a fashion that is susceptible of identifying particular services that petitioner withdrew from the St. Louis market.

This Court's intervention is essential because the Eighth Circuit's exacting standard, if left in place, would effectively ensure that licensing fees like those imposed by St. Louis are upheld and that Section 253 is rendered a nullity. A fee for access to public rights-of-way generally will not cause a telecommunications provider to withhold service from a particular customer or to withdraw a particular service. The roughly $140,000 fee that the City requires petitioner to pay for access to public rights-of-way is a fixed cost for securing access to the city as a whole. It does not vary materially based on the number of subscribers petitioner has in St. Louis. The fee's effects on competition are not limited to rendering it uneconomical for petitioner to offer services to identifiable customers in the City. Rather, the burden of the fee undermines competition by reducing a provider's incentive to offer competitive services in St. Louis *at all* and by diverting funds that would otherwise be devoted to efforts at innovation.

III. THE EIGHTH CIRCUIT CORRECTLY RECOGNIZED THAT ITS RULING GIVES RISE TO TWO CONFLICTS IN THE CIRCUITS.

This Court's review of the Eighth Circuit's erroneous construction of Section 253 is all the more warranted because, as the court of appeals expressly acknowledged, its ruling gives rise to two separate circuit conflicts. Pet. App. 30a, 34a; *see also Sprint Telephony PCS, L.P. v. County of San Deigo*, 542 F.3d 571, 577 (9th Cir. 2008) (en banc). As explained by the *amicus* brief in support of the petition

> The circuit split described in the petition has material repercussions for providers with nationwide networks, like AT&T, which face conflicting Section 253 standards across the country. . . . To mitigate such disincentives for technological advancement, the Court should establish a uniform standard for Section 253.

AT&T *Amicus* Br. 18-19. *See also* Pet. 30-31 (demonstrating that national uniformity is essential).

Respondent principally contends that no circuit finds "a violation of Section 253(a) in the face of evidence that the challenged ordinance had no material 'effect' on the plaintiffs." BIO 28-29. But that argument rests on the misstatement of the record discussed above. Of note, despite all of the City's rhetoric, none of the decisions giving rise to a circuit conflict rests in *any* respect on a finding that the plaintiff telecommunications provider failed to provide *any* particular service in the defendant municipality. Rather, the ordinances in those cases, like this one, exacted substantial fees, did not mandate that the local government grant licenses, or discriminated in favor of the incumbent service provider. *See* Pet. 24-27.

Respondent's alternative argument is that the circuits apply a uniform rule because every court of appeals has "relied on the FCC's test" that Section 253 preempts local regulations that have a "material" effect on competition. BIO 29. But while several courts of appeals cite that formulation at a *very* high level of generality, the Eighth Circuit correctly recognized that they nonetheless interpret it very differently, applying a substantially more lenient standard for finding that the costs imposed by a

licensing regime give rise to preemption under Section 253. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) ("substantial cost"); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (fee greater than that imposed on incumbent service provider); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (fees, if adopted by other jurisdictions served by the provider, would "significantly increase [the provider's] costs and reduce the profitability of its operations"). The fee invalidated in *Guayanilla*, for example, was five percent of the provider's revenues (450 F.3d at 12 & n.3), which is *trivial* compared to St. Louis's exorbitant charge. *See supra* at 6-7.

Further, unlike the Eighth Circuit, other courts of appeals account for the effect of the challenged ordinance beyond the mere ability of the specific plaintiff telecommunications provider to supply services in that particular jurisdiction. For example, the Second and Tenth Circuits have held that Section 253 preempts provisions that grant a municipality the discretion not to issue a license, even when that discretion is not exercised. *See White Plains*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1270. The City avers that it has never "chosen not to execute a license" that has been authorized by the City's Board of Public Service. BIO 4. But the same was true in *White Plains* and *Santa Fe*. Respondent's further assertion that "the district court found it did not" have "unfettered discretion" in licensing (*id.* at 20), is incorrect: the court only discussed an entirely separate provision governing the submission of licensing information (*see* Pet. App. 57a-58a

(discussing Ch. 23.64.050(B)); and respondent notably does *not* deny that it retains the discretion to deny a license even when the Board approves it. *See* Ch. 23.64.050(C) (City is merely "empower[ed]" to issue a license); Pet. 6.

Finally, the City ignores the conflict created by the Eighth Circuit's ruling that St. Louis's ordinance is not preempted notwithstanding that it discriminates in favor of the incumbent and against competitive providers such as petitioner. Thus, in *White Plains*, the Second Circuit invalidated a license fee that discriminated in favor of the incumbent provider. 305 F.3d at 79-80. The Second Circuit would necessarily invalidate St. Louis's ordinance, given that incumbents there not only are subject to a far less onerous regulatory regime, but pay a fee of only 10% of revenues, in contrast to the nearly 200% fee paid by petitioner. *See* Pet. at 7.

Because the Eighth Circuit's decision misconstrues an essential provision of the Telecommunications Act in conflict with decisions of other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

December 2008

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

APPENDIX

No. 08-759

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC, IN SUPPORT OF NEITHER PARTY

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
2029 Century Park East,
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

INTEREST OF *AMICUS CURIAE* 4

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC 4

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

City of Rancho Palo Verdes v. Abrams, 544 U.S. 113 (2005) 5

Puerto Rico Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006) 4

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 4

TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000) 3

TCG NY, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) 4

United States v. *Salerno*, 481 U.S. 739 (1987) 5

Pending Petitions

No. 08-108, *Flores-Figueroa v. United States* 4

No. 08-5316, *Mendoza-Gonzales v. United States* 4

Statutes

Telecommunications Act of 1996:

Section 253(a) 2, 3

Section 253(c) 1, 2, 4

Section 332(c)(7) 3

INTEREST OF AMICUS CURIAE

Amicus curiae Level 3 Communications, LLC, is the petitioner in a pending petition for certiorari (No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.*) discussed in the petition for certiorari in this case.

BRIEF *AMICUS CURIAE* OF LEVEL 3 COMMUNICATIONS, LLC[1]

Amicus is the petitioner in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, Mo.* (hereinafter, *Level 3*). *Amicus* agrees with the petitioner in this case that the decision of the Ninth Circuit (like the decision of the Eighth Circuit that it expressly adopts) directly implicated an important and recurring circuit conflict and seriously misreads the Telecommunications Act of 1996. Those decisions cannot be reconciled with the plain text of the statute or the pro-competitive purpose underlying its enactment. Nor, as petitioner Sprint explains (at 19-20), do those rulings draw any support from the

---

[1] Pursuant to Rule 37.2, all parties have consented to the filings of this brief, and letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

position of the Federal Communications Commission.[2]

Amicus nonetheless disagrees with the contentions of petitioner Sprint that its petition (hereinafter, *Sprint*) presents a better vehicle than *Level 3* to resolve the recurring conflicts in the circuits over the proper construction of Section 253 of the Telecommunications Act of 1996, or alternatively that the cases should both be granted and consolidated for briefing and argument. *See Sprint* Pet. at 26-28, For six reasons, it would be unwise for the Court to grant certiorari in this case rather than *Level 3*. Nor should the Court consolidate the two together.

---

[2] Indeed, in *Level 3*, respondent City of St. Louis acknowledges that the standard applied by the Ninth Circuit prior to its recent en banc ruling in *Sprint* – which broadly applied Section 253 to find preemption – "has been used by the FCC and other courts." *Level 3* BIO 26. St. Louis nonetheless argues that the FCC supports the City's position in light of "suggested guidelines" in which the FCC requests information on the "specific telecommunications service or services . . . the petitioner [is] prohibited or effectively prohibited from providing." *Id.* at 18 (quoting 13 F.C.C.R. 22970 (1998)). But that request for information is not equivalent to a legal standard for proving preemption. St. Louis also omits the FCC's caution that "not all questions will be relevant to all petitions" (13 F.C.C.R. 22971), as well as its directive that parties submit information on factors that the Eighth and Ninth Circuits would deem irrelevant, such as "whether price levels in the market preclude recovery of any such additional costs" and "cumulative adverse effects of requirements flowing from multiple local regulatory regimes" across the country (*id.* at 22972).

First, only *Level 3* presents the Court with the opportunity to resolve the conflict with the Sixth Circuit's holding in *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), that Section 253(c) provides an independent basis for finding preemption under the Telecommunications Act, without regard to whether the challenged ordinance runs afoul of Section 253(a). The Eighth Circuit squarely acknowledged that conflict and, in response to Level 3's argument, passed upon the issue. No. 08-626 Pet. App. 28a.[3]

Second, and relatedly, the proper construction of Section 253(a) cannot be understood without reference to the exception provided by Section 253(c). *See Level 3* Pet. for Cert. 20-21; *Level 3* Cert. Reply 4-6. Thus, a significant argument of telecommunications providers in support of preemption under Section 253 is that the proper measure of whether a fee effectively prohibits a telecommunications service is whether it is "fair and reasonable" within the meaning of Section 253(c). Because Sprint has avowedly abandoned all reliance on Section 253(c) (*see Sprint* Pet. for Cert. 28 n.10), granting only its petition threatens to either distort or leave unresolved the preemptive effect of Section 253. In an analogous circumstance, the Court

---

[3] In its brief in opposition in *Level 3*, St. Louis asserts that the Eighth Circuit "did not interpret or apply Section 253(c)." *Level 3* BIO 12. In fact, as the City elsewhere recognizes, the court of appeals squarely "ruled that Section 253(c) does not independently limit local government action." *Id.* at 11 (citing Pet. App. 28a-29a). That ruling directly responded to petitioner's submissions. *See Level 3* Pet. App. 28a.

recently granted certiorari in No. 08-108, *Flores-Figueroa v. United States*. Although the Solicitor General had acquiesced to certiorari in an earlier-filed petition presenting the same question (No. 08-5316, *Mendoza-Gonzales v. United States*), the petitioner in *Flores-Figueroa* presented a more complete set of arguments in support of the defendants' construction of the statute at issue in that case. *See Flores-Figueroa* Cert. Reply 2-4.

Third, the *Level 3* petition more directly presents the circuit conflict over the proper construction of Section 253(a). The decisions of other circuits affording broad preemptive effect to Section 253 all involve local regulations governing telecommunications providers' access to public rights-of-way. *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002). That is the factual context in which the *Level 3* petition arises, and that petition accordingly presents the Court with the benefits that come from the percolation in the lower courts of the question of when such measures violate Section 253. The *Level 3* petition (at 32-33 & n.6) also collects the significant array of similar litigation that is pending in the lower courts.

Sprint, by contrast, involves the rules governing the siting of wireless telecommunications equipment, a distinct factual context that has not been the subject of conflicting appellate rulings or equivalent percolation. Importantly, *Sprint* does not present the recurring question, on which the courts of appeals are divided, of the scope of a local government's authority

to charge licensing fees for access to public rights-of-way.

Fourth, *Sprint* presents a potentially significant complication that could prevent this Court from resolving the proper construction of Section 253. A separate provision of the Telecommunications Act, Section 332(c)(7), directly governs "local zoning authority" over "[m]obile services" and provides that a local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The respondent county in *Sprint* contends that the case is properly resolved under Section 332(c)(7), not Section 253. Although there is certainly overlap between the provisions, the former is limited to competition in "personal wireless services." Section 332(c)(7) moreover contains no equivalent to Section 253(c)'s restriction of local regulation to "fair and reasonable compensation." Further, Section 332(c)(7) contains its own distinct set of procedural requirements. *See City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113 (2005).

Fifth, *Sprint* also is an inappropriate vehicle in which to resolve the proper construction of Section 253 because the case was framed in the Ninth Circuit as a "facial challenge" to San Diego's regulatory scheme. As a consequence, *Sprint* presents the unusual overlay – raised in few if any other cases involving Section 253 – of the proper role of "the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that 'no set of circumstances exists under which the [challenged statute] would be valid.'" *Sprint* Pet. for Cert. 11 (alteration in original). The respondent city in *Sprint* is thus sure to argue that the Court need not resolve

the proper construction of Section 253 in that case because its regulatory scheme can at the least be lawfully applied in appropriate circumstances.

Sixth, and more broadly, *Sprint* is a poor vehicle for resolving the scope of Section 253, because there is no record in that case of how the challenged wireless regulation functions in practice. Rather, Sprint challenged the regulation soon after it went into effect. *See Sprint* Pet. App. 4a. The petitioner in *Level 3*, by contrast, operated for several years under the St. Louis regulatory scheme.

The remaining question is whether certiorari should be granted in both *Level 3* and *Sprint* and the two consolidated for briefing and argument. As the example of the *Flores-Figueroa* and *Mendoza-Gonzales* petitions illustrates, *see supra* at 3-4, this Court's general practice is not to grant review in multiple cases presenting the same question. Sprint presents no substantial basis for departing from that practice here. If certiorari is granted in *Level 3*, Sprint no doubt will file an *amicus* brief on the merits, which could bring to the Court's attention any special considerations relating to wireless telecommunications services.

There would moreover be a material cost to adopting Sprint's proposal to hear the cases together. The parties in *Level 3* coordinated the briefing schedule in that case to present this Court with the opportunity, if it granted certiorari, to decide the case this Term. Level 3 thus filed its petition early and the City of St. Louis took only an abbreviated extension of time to respond. The case accordingly is scheduled to be considered at the Court's Conference of January 16, 2009, which is likely to be the last

opportunity for cases to be set for argument this Term.

By contrast, in *Sprint*, the petitioner took all of its available time before filing its petition, and the respondent has taken a thirty-day extension of time to respond. As is illustrated by No. 08-645, *Abbott v. Abbot*, Sprint could have filed its petition as late as mid-November and still guaranteed that its case was available for Conference in mid-January. But it elected not to do so. *Sprint* accordingly will likely not be set for Conference until March 20, 2009. If the two petitions were granted on that date, the cases likely would not be argued until November 2009 and not decided until the Spring of 2010. Sprint's suggestion thus invites nearly a year of additional delay.

It would be inadvisable to so significantly defer resolving this important question. Both Level 3 and Sprint agree that the issue is of surpassing interest to the telecommunications industry. The current uncertainty over the scope of permissible local regulation "necessitates *immediate* intervention." *Sprint* Pet. for Cert. 23 (emphasis added). Local governments have a similarly significant interest in finally securing certainty regarding the scope of their regulatory authority. That is no doubt why St. Louis opposes Sprint's request as well. *See Level 3* BIO 37 n.23. Indeed, as the *Level 3* petition demonstrates (at 32 n.6), there is a wide array of litigation over the proper scope of Section 253 now pending in the district courts. The efficient disposition of those cases would be materially advanced by a prompt ruling by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari in No. 08-626, *Level 3 Communications, LLC v. City of St. Louis, MO.* The Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Level 3.*

Respectfully submitted,

Rex S. Heinke
Michael C. Small
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Thomas C. Goldstein
Counsel of Record
Anthony T. Pierce
W. Randolph Teslik
Patricia A. Millett
Tobias E. Zimmerman
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

December 2008